Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

(4)

NO. 90-774

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DAN M. LINKOUS
Petitioner,

v.

THOMAS STOVALL, et. al.
Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO
THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

APPENDIX TO JOINT RESPONSE TO PETITION FOR WRIT OF CERTIORARI

FLOYD, TAYLOR & RILEY

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Donn C. Fullenweider

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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHER DISTRICT OF TEXAS
HOUSTON DIVISION

DAN M. LINKOUS, Plaintiff	§	
	§	
VS.	§	CIVIL ACTION NO. H-85-3676
	§	
HONORABLE CHARLES DEAN HUCKABEE, JUDGE OF THE 247TH JUDICIAL DISTRICT COURT OF HARRIS COUNTY, TEXAS; HONORABLE ARTHUR C. LESHER, JUDGE; DONN C. FULLENWEIDER; DON FOGO; MURIEL FLAKE; AND NANCY LINKOUS, Defendants.	§	

MEMORANDUM AND ORDER

Pending before the Court are Defendants' Rule 12 motions to dismiss...

* * *

In this action, Plaintiff claims Defendants engaged in irregularities and improprieties during the course of the litigation. Asserting federal question jurisdiction under 28 U.S.C. §§ 1331,

1343(3) and 1343(4), Plaintiff alleges that Defendants' actions deprived him of his fundamental liberty interest in access to his children.

* * *

First, this Court does not have subject-matter jurisdiction over most of Plaintiff's claims. Plaintiff contends that he is not seeking to litigate his divorce case in this court but rather he is seeking to address the violation of his constitutionally protected rights. The Court finds that Plaintiff is, in essence, seeking reversal of the interlocutory state court decisions. Such relief is in the nature of appellate review and outside the purview of this Court's jurisdiction.

* * *

Secondly, Plaintiff's complaint against Defendants Huckabee and Lesher

fails to state a claim upon which relief can be granted. A judge acting within his judicial jurisdiction enjoys absolute immunity.

* * *

Next, the Court will analyze Defendants Linkous', Flake's, Fogo's and Fullenweider's motions to dismiss Plaintiff's first amended complaint. Defendants' Fed. R. Civ. P. 12(b)(1) motion also asserts lack of appellate jurisdiction, or, alternatively, the application of the doctrine of abstention. Defendants' Fed. R. Civ. P. 12(b)(6) motion contends that Plaintiff cannot state a claim under Section 1983 because Defendants have not acted "under color of state law."

As previously stated, the Court concludes subject-matter jurisdiction over Plaintiff's claims is lacking.

First, Plaintiff is essentially seeking reversal of the state court decision. Such relief is in the nature of state appellate review and outside this Court's jurisdiction. Second, this Court abstains from exercising jurisdiction with domestic relation issues traditionally within the province of state courts.

In order for Plaintiff to obtain relief under 42 U.S.C. §1983, Plaintiff must show that Defendants deprived him of a constitutional or federal law right, and that the deprivation occurred under color of state law....

The Court finds that Plaintiff has failed to state a cause of action under 42 U.S.C. §1983.

Moreover none of the individual Defendants' acts against Plaintiff "occurred under color of state law."

* * *

Plaintiff's remaining cause of action in his amended complaint alleges that Section 11.11 of the Texas Family Code is unconstitutional...

The Court again lacks jurisdiction. Plaintiff's claim for declaratory relief is a suit barred by the Eleventh Amendment because the State of Texas is the real party in interest.

* * *

In accordance with the foregoing opinion, the Court

ORDERS all claims against Defendants Kenyon, Huckabee and Lesher are DISMISSED. The Court further finds that Plaintiff's claims against these Defendants were not warranted by the facts and existing law and were presented in bad faith for the purpose of harassment. Thus, the Court finds Rule 11 sanctions are appropriate. See Hale v. Harney, 786

F.2d 688 (5th Cir. 1986). Defendants' counsel shall file affidavits of attorneys' fees by November 2, 1987. Plaintiff may file a controverting affidavit by November 12, 1987. The Court will then impose appropriate sanctions against Plaintiff, for which Plaintiff and Plaintiff's counsel shall be jointly and severally liable. The Court further

ORDERS all motions to dismiss all claims contained in Plaintiff's amended complaint are GRANTED....

The Court DEFERS ruling on Defendant Fullenweider's motion for sanctions. The Court will sua sponte impose further Rule 11 sanctions against Plaintiff and Plaintiff's counsel at the conclusion of this litigation for Plaintiff's conduct to date. Plaintiff has consumed considerable judicial resources to rule on multiple frivolous and bad faith claims. This

litigation is now narrowed to one issue and limited to a small number of defendants. Plaintiff is cautioned that continued abuse of judicial resources will only result in an increase in the amount of sanctions that will be ordered.

DONE in Houston, Texas, this 16th day of October, 1987.

James DeAnda
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DAN M. LINKOUS	*	
	*	
VS.	*	CIVIL ACTION NO.
	*	H-85-3676
	*	
DONN C. FULLENWEIDER	*	

ORDER

Pending before the Court are Plaintiff Dan M. Linkous' motion for reconsideration of the Court's final judgment, Defendants Nancy Linkous, Thomas Henderson's, Donn Fullenweider's motions for sanctions...

Defendants Nancy Linkous, Thomas Henderson, and Donn Fullenweider have filed motions for sanctions requesting reimbursement for costs and attorneys' fees. The Court has already found in its October 16, 1987 Memorandum and Order that Plaintiff's original complaint vio-

lated Fed. R. Civ. P. 11. The Court now further finds that Plaintiff's motion for leave to file a third amended complaint violated Fed. R. Civ. P. 11 because it was filed merely to harass or to cause unnecessary delay or needless increase in the cost of litigation. Moreover, the Court finds that Plaintiff's discovery requests and objections to discovery were filed merely to harass or to cause unnecessary delay or needless increase in the cost of litigation in violation of Fed. R. Civ. P. 26(g) and 28 U.S.C. §1927. Plaintiff's insistence upon filing numerous pleadings pro se justifies the imposition of sanctions against both him and his counsel.

Defendants have requested full reimbursement as a sanction. However, it is clear that full reimbursement for costs and attorneys' fees would exceed

$100,000.00, an amount that Plaintiff and Plaintiff's counsel could almost surely not repay and that may be more than is necessary to deter future violations of Rules 11 and 26 and 28 U.S.C. §1972. The Court concludes that a sanction of $10,000.00 payable to each Defendant, Nancy Linkous, Thomas Henderson, and Donn Fullenweider, (for a total of $30,000.00) would be sufficient to serve the goals of Rules 11 and 26 and 28 U.S.C. §1927. The Court notes, however, that these sanctions are in addition to the taxable costs of court, which the Court awarded all Defendants in its final judgment.

* * *

ORDERED that Defendants Nancy Linkous', Thomas Henderson's, and Donn Fullenweider's motions for sanctions are GRANTED. James Murphy and Dan M. Linkous are jointly liable to pay the sum of

$10,000.00 to each Defendant; i.e., Nancy Linkous, Thomas Henderson, and Donn Fullenweider. It is further

ORDERED that Plaintiff's motion to reconsider the Court's final judgment is DENIED.

SIGNED in Houston, Texas this 22nd day of March, 1990.

JAMES DeANDA, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DAN M. LINKOUS,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
HONORABLE THOMAS J. STOVALL, JR., AS PRESIDING JUDGE OF THE SECOND ADMINISTRATIVE JUDICIAL DISTRICT OF TEXAS; HONORABLE DEAN HUCKABEE,	§	CIVIL ACTION NO. H-85-3676
	§	
JUDGE OF THE 247TH JUDICIAL DISTRICT COURT OF HARRIS COUNTY, TEXAS; HONORABLE ARTHUR C. LESHER, JUDGE; DONN C. FULLENWEIDER; DON FOGO; MURIEL FLAKE; AND NANCY L. LINKOUS,	§	
	§	
Defendants.	§	

COMPLAINT

DAN M. LINKOUS, hereafter referred to as Plaintiff, brings this civil rights suit for damages, injunctive and declaratory relief pursuant to 42 U.S.C. §1983 and 28 U.S.C. §§ 2201 & 2202, to enjoin the on-going deprivation of Plaintiff's fundamental liberty interest in the right to family integrity, his relationship with his children, and his right to due process of law in connection with preparation for a state court custody suit. Plaintiff also seeks declaratory relief that § 11.11 of the Texas Family Code is facially unconstitutional and as applied.

I.

PARTIES

All parties to this suit are citizens of the United States and the State of Texas, and reside within the Southern District of Texas.

Plaintiff is the natural father of Jessica Louise Linkous and Danny Michael Linkous, Jr. He is a physician who resides and practices medicine in the Southern District of Texas.

Honorable Thomas J. Stovall, Jr., is the presiding judge of the Second Administrative Judicial District of Texas, and is joined only in such capacity since he maintains supervisory power over the state court proceedings which give rise to this action.

Honorable Dean Huckabee is the presiding judge of the 247th Judicial District Court of Harris County, Texas, which court has and maintains jurisdiction over the state court proceedings which give rise to this action.

Honorable Arthur C. Lesher is a retired judge who was appointed by Judge Stovall to preside over the most recent

state court proceedings which are infringing upon Plaintiff's constitutionally protected liberty interests.

Donn C. Fullenweider is an attorney who represents Defendant Nancy L. Linkous in the referenced state court proceedings.

Don Fogo is an attorney appointed as an ad litem for the children in connection with the state court proceedings.

Muriel Flake is a court-appointed counselor who has participated and is participating in the on-going deprivation of Plaintiff's liberty interests, contrary to a previous state court order.

Nancy L. Linkous is Plaintiff's wife, and she, under color of state law, maintains custody of the two minor children to the exclusion of Plaintiff, pursuant to state action.

II.

FACTUAL STATEMENT

Plaintiff and Defendant Nancy L. Linkous have been married for a number of years, and are the natural parents of Jessica Louise Linkous and Danny Michael Linkous, Jr., who are ages 7 and 6 respectively. On April 4, 1983, Defendant Nancy L. Linkous filed an action for divorce against Plaintiff in the 247th Judicial District Court of Harris County, Texas, in cause number 83-28196, styled In the Matter of the Marriage of Nancy L. Linkous and Danny Michael Linkous, Danny M. Linkous, M.D., P.A., and In the Interest of Jessica Louise Linkous and Danny Michael Linkous, Jr., Minor Children.

Through various temporary orders, Defendant Nancy L. Linkous has been named Temporary Managing Conservator of the children, and Plaintiff has been named Temporary Possessory Conservator, with

rights of possession and access, at specified times and places. Copies of these relevant orders are attached hereto collectively as Exhibit "A". However, on March 15, 1985, Defendant Huckabee, contrary to state law and procedure, and with an intent to punish and harass Plaintiff due to prior conflicts between Plaintiff and said Defendant, orally pronounced a purported "emergency order" under § 11.11, Texas Family Code, terminating and suspending Plaintiff's rights to access to and possession of his two minor children without hearing and notice on the issue to Plaintiff. Defendants Huckabee, Fullenweider and Nancy L. Linkous were all acting under color of state law in this regard. As a result of such conduct on the part of Defendant Huckabee, Plaintiff filed a Motion to Recuse Judge Huckabee, on March 16, 1985,

from further participation in the case under Rule 18A, Texas Rules of Civil Procedure. On March 19, 1985, while the motion to recuse was then pending without resolution, Judge Huckabee entered an order, a copy of which is attached hereto as Exhibit "B", which memorialized his oral pronouncement of March 15, 1985. Plaintiff has not seen, nor has he had access to his children since.

On May 15, 1985, Plaintiff filed a motion to lift the emergency order entered by Judge Huckabee, and, since Plaintiff's motion to recuse was still then pending, Judge Stovall appointed Defendant Arthur C. Lesher to hear the matter. A copy of Plaintiff's motion is attached hereto as Exhibit "C". A hearing was held on May 28, 1985, before Judge Lesher, wherein he declined to entertain Plaintiff's motion because of

the pending recusal motion, and a motion filed by Defendant Fogo for visitation between Plaintiff and his children was denied by Judge Lesher. Judge Lesher entered an order, a copy of which is attached hereto as Exhibit "D", which effectively prevents Plaintiff from possession of and access to his children indefinitely. Plaintiff contends that this order once again was entered contrary to state law and procedure, and without evidentiary support, and once again Plaintiff has been and is being denied his fundamental liberty interests to family integrity and a meaningful relationship with his children.

Texas law prohibits any appellate review of temporary orders of this nature, and Plaintiff is relegated to a total absence of contact with his children while the divorce/custody case is

still pending in state court. Trial on the merits is not set until December 1985. Plaintiff is being continually deprived of his fundamental liberty interests without due process of law, and he is being effectively deprived of due process of law in connection with the pending state court custody case since he is unable to see his children. Without access to his children, Plaintiff is unable to meaningfully prepare for the final determination of the custody issue. The conduct of Defendants Huckabee, Lesher, Fullenweider, Fogo, Flake and Nancy Linkous is designed to prevent Plaintiff from access to his children during the pendency of the custody lawsuit, with a view to making the ultimate determination of the custody issue a foregone conclusion in favor of Defendant Nancy Linkous. Furthermore, the conduct

of said Defendants in depriving Plaintiff of his fundamental liberty interests without due process is being used by said Defendants to leverage Plaintiff into a position of settlement by threatening Plaintiff with ultimate destruction of family integrity and Plaintiff's relationship with his children. All of such conduct is under color of state law, and said Defendants are acting in concert with each other to deprive Plaintiff of his fundamental liberty interests and due process of law.

III.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1331 & 1343 (3) & (4), since this is an action arising under the Constitution and laws of the United States. Plaintiff's cause of action arises under 42 U.S.C. §§ 1983,

1985, 1986, 1988, and the Constitution of the United States and all amendments thereto. The acts and practices of the Defendants and their agents, as alleged herein, were and are being preformed under color of law, and, therefore, constitute actions of the State within the meaning of 42 U.S.C. 1983, and the Fourteenth Amendment to the United States Constitution. By reason of the conduct of the Defendants herein, as alleged, Plaintiff is being denied and deprived of his fundamental liberty interest of a meaningful parent/child relationship and family integrity, through procedures which violate the First, Fourth, Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution. Plaintiff's parent/child relationship has been and is continually being damaged, harmed and destroyed by the acts

and practices of Defendants, and Plaintiff is suffering irreparable injury and is threatened with irreparable harm in the future by the acts complained of herein, with no adequate remedy under state law to vindicate same. A substantial loss and impairment of Plaintiff's fundamental liberty interests and his due process rights attendant to a final determination of such liberty interests has occurred and will continue to occur so long as Defendant's collective conduct continues.

IV.

CAUSES OF ACTION

1. Plaintiff seeks a preliminary injunction against Defendants prohibiting each of them from depriving Plaintiff of his fundamental liberty interests in his parent/child relationship and his due process rights attendant to a final de-

termination of the issue of custody in the state court proceedings. Plaintiff has no plain, adequate remedy to speedily redress the wrongs herein complained of, other than through this action. Because of the precedential attitude of bad faith and harassment previously exhibited by Defendants toward Plaintiff, any other remedy to which Plaintiff could be remitted in the state courts would be attended by such uncertainties and delays as to deny substantial relief, involve a multiplicity of suits, and cause further irreparable injury, damage, harm and inconvenience to Plaintiff. The award of damages is not adequate to protect Plaintiff from the continuing conduct of Defendants and the chilling effect such conduct has upon the exercise of Plaintiff's constitutional rights. On final hearing herein, Plaintiff requests

that the preliminary injunction be made permanent, and that Plaintiff recover damages from Defendants in an appropriate sum, for the damages heretofore sustained by Plaintiff because of the alleged conduct, along with attorney's fees and costs of court.

2. Plaintiff further requests that the Court declare § 11.11 of the Texas Family Code unconstitutional on its face and as construed and applied, because it allows state interference with a fundamental liberty interest during the course of an on-going controversy that alters the status quo of the family integrity and the parent/child relationship without due process of law, nor does it allow any procedure or means by which such decisions can be reviewed to determine their validity. Further, § 11.11 operates to deprive Plaintiff and those similarly

situated of equal protection of law, as construed and applied.

V.

ANTI-INJUNCTION STATUTE AND ABSTENTION

Inasmuch as this is a suit to redress the deprivation under color of state law rights secured to Plaintiff by the Constitution, this case falls within the exception to the federal anti-injunction statute, 28 U.S.C. § 2283, that provides that a federal court may not enjoin state court proceedings "except as expressly authorized by Act of Congress."

Plaintiff further alleges and will show that abstention is inappropriate in this case because of bad faith harassment of Plaintiff, and the existence of extraordinary circumstances which create a pressing need for immediate federal equi-

table relief to protect Plaintiff from great, immediate and irreparable harm.

WHEREFORE, Plaintiff prays that this Court:

1. Set this matter for hearing on an expedited basis to hear Plaintiff's request for a preliminary injunction;

2. Upon hearing, preliminarily and permanently enjoin Defendants from depriving Plaintiff of his fundamental liberty interests in his relationship with his children and family integrity, and for such other injunctive relief which the Court deems appropriate consistent with the allegations contained herein;

3. Declare that § 11.11, Texas Family Code, on its face and as construed and applied, deprives a parent of a fundamental liberty interest without due

process and violates equal protection of law;

4. And, award Plaintiff damages, attorney's fees and costs, and such other and further relief, both general and special, at law or in equity, to which Plaintiff might show himself justly entitled.

Respectfully submitted,

DANNY MICHAEL LINKOUS, pro se

/s/

3102 Breezy Pines
Kingwood, Texas 77339

AFFIDAVIT OF DAN M. LINKOUS

STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared DAN M. LINKOUS, known to me to be the person whose signature appears hereinafter, who, after being by me duly sworn, stated upon his oath as follows:

> "My name is Dan M. Linkous. I am over the age of 21 years and am fully competent and able to make and give this affidavit. I have personal knowledge of the matters of fact contained in the foregoing Complaint; I have read said Complaint; and the matters of fact and the allegations contained therein are true and correct."

/s/
DAN M. LINKOUS

SUBSCRIBED AND SWORN TO before me on this 26th day of June, 1985.

/s/ Bonnie S. Titus
NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DAN M. LINKOUS	§	
	§	
Plaintiff,	§	
	§	
V.	§	CIVIL ACTION NO.
	§	H-85-3676
	§	
HONORABLE CHARLES DEAN HUCKABEE, JUDGE OF THE 247TH JUDICIAL DISTRICT COURT OF HARRIS COUNTY, TEXAS; HONORABLE ARTHUR C. LESHER, JUDGE; DONN C. FULLENWEIDER DON FOGO; MURIEL FLAKE; NANCY L. LINKOUS; HONORABLE THOMAS KENYON; SITTING AS PRESIDING JUDGE OF THE 247TH JUDICIAL DISTRICT COURT OF HARRIS COUNTY, TEXAS; THOMAS HENDERSON; AND THE 247TH JUDICIAL DISTRICT COURT OF	§	

HARRIS COUNTY, §
TEXAS §
Defendants. §

SECOND AMENDED COMPLAINT

DAN M. LINKOUS, Plaintiff, with leave of Court first having been obtained, respectfully files this Second Amended Complaint. This Second Amended Complaint seeks to incorporate Plaintiff's Amended Complaint filed on November 12, 1985, and further seeks redress for damages and for injunctive relief pursuant to 18 U.S.C. Sections 1961, 1962, 1964, 1965 and 1966 [R.I.C.O.].

I.

JURISDICTION

The jurisdiction of this Court has been invoked under 28 U.S.C. Sections 1331 and 1343 (3) and (4), since this is an action arising under the Constitution and laws of the United States. Jurisdic-

tion is further invoked pursuant to 18 U.S.C. § 1962.

II.

PARTIES AND FACTUAL STATEMENT

All parties to this suit are citizens of the United States and the State of Texas, and reside within the Southern District of Texas, with the exception of the party defendant 247th Judicial District Court of Harris County, Texas.

Plaintiff is the natural father of Jessica Louise Linkous and Any Michael Linkous, Jr., who are minor children. Plaintiff is a physician who resides and practices medicine in the Southern District of Texas.

Honorable Charles Dean Huckabee is the elected judge of the 247th Judicial District Court of Harris County, Texas, which court has been assigned to preside

over the state court proceedings which give rise to this action.

Honorable Arthur C. Lesher is a retired judge who was appointed by the presiding judge of the Second Administrative Judicial District to preside over a hearing which resulted in deprivations of Plaintiff's fundamental liberty interests.

Donn C. Fullenweider is an attorney who represents Defendant Nancy L. Linkous in the referenced state court proceedings.

Don Fogo is an attorney appointed as an ad litem for the minor children in connection with the state court proceedings.

Muriel Flake is a court appointed counselor who has participated and is participating in the deprivations of

Plaintiff's fundamental liberty interests.

Nancy L. Linkous is Plaintiff's wife, and she, under color of state law, maintains custody of the two minor children, pursuant to state action.

Honorable Thomas Kenyon is the elected presiding judge of the 300 District Court of Brazoria County, Texas, however, said judge was appointed by the administrative judge of the Second Administrative Judicial District of Texas to preside over the divorce/custody case involving Plaintiff and Nancy L. Linkous.

Thomas Henderson is an attorney and member of the firm of Sheinfeld, Maley and Kay, and at all times material hereto, has been employed as bankruptcy counsel for Defendants Nancy Linkous and Fullenweider.

The 247th Judicial District Court of Harris County, Texas, is a duly constituted district court under the constitution and laws of the State of Texas, Harris County, Texas is within the Southern District of Texas.

FACTUAL STATEMENT

Plaintiff alleges, contends, charges and will show, as follows:

1. Plaintiff and Defendant Nancy L. Linkous, have been married since June 1, 1977, and are natural parents of Jessica Louise Linkous and Danny Michael Linkous, Jr., who are ages 8 and 7, respectively. On April 4, 1983, Defendant Nancy L. Linkous, through then counsel, Irving Stern, instituted an action for divorce against Plaintiff in the 247th Judicial District Court of Harris County, Texas, in cause number 83-28196, styled In the Matter of The Marriage of Nancy L.

Linkous and Danny M. Linkous, M.D., and In The Interest of Jessica Louise Linkous and Danny Michael Linkous, Jr., Minor Children.

2. The presiding judge was Honorable Bruce Wettman, who resigned in October 1983, after which Honorable Dean Huckabee, a Family Court master for several years, was appointed presiding judge of the 247th District Court.

3. In October 1983, custody became an issue and was requested by Plaintiff's then-attorney. A Jury fee was paid for trial by jury in December 1983. After custody became an issue, in October 1983, defendant Fullenweider made his appearance as lead counsel for Defendant Nancy Linkous. Defendant Don Fogo was appointed by the court, in November 1983, to act as attorney ad litem for the children during the pendency of the di-

vorce suit. In December 1983, Defendant Flake was apparently appointed by the court to interview the parties and children and report her findings to the court. She is a non-clinical psychologist, who is frequently appointed by the Family Courts in Harris County to make findings and recommendations relating to the ultimate issue of child custody.

4. Through numerous temporary orders, Defendant Nancy L. Linkous, was named primary custodian of the minor children. Plaintiff was named Temporary Possessory Conservator of the children, which is the secondary custodial parent under Texas law, with rights of visitation with the children during the pendency of the suit.

5. In early April, 1983, when Defendant Nancy Linkous filed for divorce and voluntarily left the family home, she

secretly took over $500,000.00 worth of municipal bonds, some of which were bearer bonds. Turnover of the bonds for use by the estate was requested of Defendants Nancy Linkous and Fullenweider by the State court by order signed on the 25th day of January, 1984. After Defendants Nancy Linkous and Fullenweider failed to relinquish the bonds, another State court order of March 19, 1984, ordered the bonds to be placed in a Goldman-Sachs Escrow Account. Because of the degree of difficulty in obtaining funds from the escrow account to pay bills, notes and carry on business of the estate, Plaintiff's estate had liens affixed, suits filed for default on notes and partnership contributions, and interest and penalties on back accrued and assessed taxes.

6. By reason of this conduct of Defendants Nancy Linkous and Fullenweider, Plaintiff was compelled to seek protection under Title 11, U.S.C. [Chapter 11 of the Bankruptcy Act], and on July 2, 1984, Plaintiff filed in the Bankruptcy Court for the Southern District of Texas, sitting in Houston, Texas, a Chapter 11 Petition. Such petition was filed because of imminent foreclosure on the marital home; default on certain partnership contributions; bounced tax shelters and other obligations owing to the Internal Revenue Service; assessments for taxes, penalties and interest impressed against the marital estate by the Internal Revenue Service; and creditors demands. Prior to the filing of the petition in the bankruptcy court, Plaintiff collapsed a Defined Benefits Plan and Money Purchase Trust Plan because

Defendant Nancy Linkous had appropriated approximately one-half million dollars of negotiable securities and bonds. The plans were collapsed to satisfy ongoing obligations of the marital estate, and Plaintiff, with a portion of said funds, invested in a certain piece of real estate known as 3102 Breezy Pines, Kingwood, Harris County, Texas. All attempts of Plaintiff to reconstitute the referenced plans were thwarted by Defendants Nancy Linkous and Fullenweider, which subjected the estate to further taxes, penalties and interest. The "Breezy Pines" property was purchased as investment and rental property, but the ongoing divorce difficulties relegated Plaintiff to live in this residence.

7. On December 19, 1984, the presiding judge of Plaintiff's bankruptcy proceedings admonished Plaintiff, Defen-

dants Nancy Linkous and Fullenweider, and all parties to refrain from further pursuit of State Court Domestic Relations proceedings. In January 1985, Defendants Nancy Linkous, through counsel and in concert with Defendants Fullenweider and Fogo, and with an intent to obstruct, impede and influence the due administration of justice of the U.S. Bankruptcy Court, circumvented the presiding bankruptcy, representing to said Judge Leal that an emergency existed which was jeopardizing the best interest and welfare of the children, and that irreparable harm would result if the bankruptcy stay was not relaxed. On January 30, 1985, Judge Manuel Leal, entered an order relaxing the automatic stay to allow the 247th District Court of Harris County, Texas, to proceed with non-property matters, including visitation and conservatorship

for the safety and welfare of the minor children.

8. Approximately one month later, on February 26, 1985, Defendant Fullenweider, apparently acting pursuant to the January 30, 1985, order of Judge Leal, and in concert with Defendant Nancy Linkous, and at her request, filed against Plaintiff in the 247th District Court, quasi-criminal proceedings alleging some 26 counts of contemptuous conduct against Plaintiff. On March 14, 1985, Plaintiff appeared in response to the contempt allegations in the 247th District Court, without counsel. Plaintiff was without counsel by reason of a direct admonition of the bankruptcy judge that Plaintiff should not hire counsel without the express permission and consent of the bankruptcy court. This situation was explained to Defendant Huckabee

by voluntary appearance of Plaintiff's bankruptcy counsel and a Family Law attorney, John Grubb, each appearing as friends of the Court. Plaintiff's bankruptcy counsel, through an amicus curiae brief, requested continuance so as to allow Plaintiff to obtain counsel through an emergency expedited motion then pending before the U. S. Bankruptcy Court. Defendant Huckabee stated that he didn't agree with the Federal Court's position and that the Federal Courts should not enter areas which he felt were not within their domain and denied all such requests and proceeded to hear contempt allegations against Plaintiff, pro se. Defendant Fogo appeared, apparently representing the children. Plaintiff requested a continuance because of lack of counsel, which was denied by Defendant Huckabee. Plaintiff pleaded with Defendant Huckabee

to allow even a 48 hour continuance to clarify the Federal Bankruptcy Court position and to allow Plaintiff an opportunity to obtain counsel for the contempt trial. Even in light of Defendants Nancy Linkous' and Fullenweider's urging for 6 months incarceration and $500.00 fine for each of the 26 quasi-criminal allegations, Defendant Huckabee still adamantly refused Plaintiff's request to be represented by counsel.

9. After two days of hearing before Defendant Huckabee, Plaintiff was not found guilty of any of the counts of contempt, and the entire proceeding was resolved in Plaintiff's favor. During the course of those contempt hearings, however, Plaintiff and Defendant Huckabee engaged in verbal arguments principally because Plaintiff was unwillingly representing himself and was unfamiliar with

the trial process. At the conclusion of the hearing, Defendant Huckabee, without sworn pleadings or affidavits, without notice, without hearing or an opportunity to be heard, and without good cause shown, although requested by Plaintiff, excluded Plaintiff's fundamental right of access to and possession of his children, and threatened Plaintiff with a jail sentence if he did not comply therewith. The order was orally pronounced from the bench on March 15, 1985, Defendant Huckabee citing § 11.11, Texas Family Code, as authority for same. § 11.11, Texas Family Code, expressly prohibits and forbids such conduct without sworn pleadings or affidavits, and Defendant Huckabee was aware of such prohibition or he should have reasonably known of same. Therefore, Defendant Huckabee, although acting under color of state law, was

acting in a total absence of subject matter jurisdiction, and in direct conflict with the prohibitions of § 11.11. Plaintiff will show that Defendant Huckabee was acting in the face of a clearly valid statute and case law which deprived him of jurisdiction to enter an order terminating Plaintiff's fundamental right to family integrity and a meaningful relationship with his children.

10. Plaintiff will further show that because of prior dealings with Plaintiff, Defendant Huckabee's action was done with an intent to punish, harass and retaliate against Plaintiff. Defendant Huckabee had previously jailed Plaintiff at the request of Defendant Flake for the reason that Defendant Flake's bill had not been paid. In this connection, Defendant Huckabee appointed his campaign treasurer, Mike Stocker, to

represent Defendant Flake in her prosecution of Plaintiff in this action on April 23, 1984. Efforts were subsequently made to conceal the fact that Defendant Huckabee had appointed Stocker. A state Court of Appeals released Plaintiff on an Application for Writ of Habeas Corpus.

11. Defendants Fullenweider's and Nancy Linkous' action in instituting quasi-criminal charges against Plaintiff was malicious and done with intent to damage and harm Plaintiff's relationship with his children, and to incite the conduct of Defendant Huckabee. Furthermore, Defendants Fullenweider's and Nancy Linkous' actions were in furtherance of their efforts to influence, obstruct and impede the due administration of justice in the United States Bankruptcy Court for the Southern District of Texas. the contempt charges dealt with allegations

that Plaintiff was being abusive of his visitation rights, including allegations that he was "cohabitating" with a female not his wife in the presence of the two children, and not with matters concerning the emergency welfare and benefit of the children, as represented to the Bankruptcy court.

12. Notwithstanding all of the foregoing, even prior to the referenced hearings, on March 11, 1985, Plaintiff, acting pro se, directed a letter to Defendant Huckabee requesting that he remove himself from further participation in this case.

13. Defendant Huckabee, then, entered a written order, dated March 19, 1985, denying Plaintiff access to and possession of his children on the very same day that Plaintiff filed a formal motion to recuse Judge Huckabee from

further participation in the case. Plaintiff believes, and therefore respectfully alleges, that the formal motion to recuse Judge Huckabee was filed with the District Clerk of Harris County, Texas, before the entry of the referenced order of defendant Huckabee. Attached hereto as a copy of Plaintiff's motion to recuse, and Plaintiff adopts the allegations and facts contained therein and incorporates same herein for all purposes. [Exhibit "A"].

14. Defendant Huckabee refused to recuse himself, therefore, on April 2 & 3, 1985, Plaintiff, who was still pro se because of the bankruptcy court's hearing, opposed by Defendant Fullenweider, which hearing was presided over by Judge Norman Lee, a former legal associate of the firm of Haynes and Fullenweider. Although the recusal was denied by Judge

Lee, retrial was granted by Judge Stovall, Presiding judge of the 2nd Administrative Judicial District because of multiple errors in the recusal procedures and trial. Defendant Huckabee again refused to recuse himself and only after an amended recusal was filed by Attorney James Murphy on September 3, 1985, did Defendant Huckabee voluntarily recuse himself on September 4, 1985.

15. The presiding bankruptcy judge, after hearing of the malicious unfounded 26 count contempt trial in State court, memorialized his prior December, 1984, admonition in writing by an April 24, 1985, order staying all state court proceedings.

16. After Plaintiff had been deprived of access to and possession of his children for almost two months, Plaintiff, with leave of the Bankruptcy

Court on May 1, 1985, first obtained, filed a motion on May 15, 1985, to lift Defendant Huckabee's order, alleging that same was unlawful, without authority and jurisdiction. Honorable Thomas Stovall, presiding judge of the administrative district, appointed Defendant Lesher to hear such motion on May 28, 1985, along with a motion filed on May 15, 1985, by Defendant Fogo. Once again, in direct violation of § 11.11, Texas Family Code, no sworn pleadings or affidavits were filed giving Defendant Lesher jurisdiction to further deprive Plaintiff of his fundamental liberty interests of right of access to and possession of his children and of family integrity and a meaningful relationship with his children. After a one-half day trial, without subject matter jurisdiction, Defendant Lesher entered an order continuing the termination

and suspension of all of Plaintiff's access to and possession of his children. Such order is dated June 4, 1985.

17. As further evidence of Defendant Huckabee's intent, Plaintiff will show that after Defendant Lesher was appointed by Judge Stovall to hear Plaintiff's motion, Plaintiff, through a private individual, attempted to serve a subpoena on Defendant Huckabee. On May 22, 1985, Defendant Huckabee arrested that individual and placed him in the custody of the Harris County Sheriff's department.

18. During this period of time Defendant Fullenweider wrote two letters to Plaintiff's hospital administrator and contacted his state medical board in order to harm Plaintiff's ability to pursue his profession.

19. As a consequence of the orders of defendant Huckabee and Lesher, Plaintiff was deprived of any access to his children from March 15, 1985, thru September 20, 1985. Another visiting judge, Solomon Casseb who was appointed by Judge Stovall on September 9, 1985, re-instituted Plaintiff's rights of access to and possession of his children, although diminished from all previous temporary orders.

20. None of the preceeding approximately 15 temporary orders specified holiday visitation and the orders were not only confusing, but were conflicting in detail, giving rise to numerous efforts to interpret same [on the part of Plaintiff and Defendant Nancy Linkous].

21. During the time of Plaintiff's non-access to his children, Defendant Flake, contrary to a previous

State and Federal court orders, continued to see the children, with a view to further destroying the parent-child relationship between Plaintiff and his children. Defendant Flake, acting in an advocate's role, as opposed to that of an independent counselor, continually and repeatedly saw, telephoned and spoke with the children, bought them gifts, ate dinner with them and their mother, Defendant Nancy L. Linkous, and spent an inordinate amount of time with them for the express purpose of ingratiating herself to them with a view to making the ultimate custody determination a foregone conclusion. Defendant Flake, acting in concert with Defendants Linkous and Fullenweider, under color of state law by virtue of her appointment by Defendant Huckabee, has attempted to turn the children's affections for Plaintiff

against Plaintiff by meeting with them, speaking with them about their father's absence from access to them, monitoring telephone conversations between Plaintiff and his children without permission from either party, all in an effort to deprive Plaintiff of meaningful access and possession prior to trial for custody.

22. Defendant Flake not only interrogated the children and attempted to brain wash them, but encouraged Defendant Nancy Linkous to remove the children from private school to public school without notification of Plaintiff, Plaintiff's counsel, or the attorney ad litem, Defendant Fogo until several days after school had started.

23. Defendant Nancy Linkous has threatened to change the children's names and move to a location where Plaintiff will never see them again. Indeed, De-

fendant Nancy Linkous has applied to move to Atlanta, Georgia, on May 7, 1985, and then again to Minnesota on August 21, 1985. Defendant Linkous has threatened Plaintiff with eventual destruction of his relationship with his children and his fundamental rights of access to and possession of his children.

24. Texas law prohibits any appellate review of "temporary orders" of the nature entered by Defendants Huckabee and Lesher. For approximately six months, in a time period crucial for preparation of a custody suit, Plaintiff was relegated to a total absence of contact with his children, and he was deprived of his fundamental liberty interests without due process of law. The conduct of Defendants Huckabee, Lesher, Fullenweider, Fogo, Flake and Nancy Linkous was designed to prevent Plaintiff

from access to his children during the pendency of the custody suit, with a view to making the ultimate determination of the custody issues a foregone conclusion in favor of Defendant Nancy Linkous.

25. Defendants Nancy Linkous and Fullenweider assisted by Defendant Henderson filed numerous motions and objections and adversarial non-dischargeability pleadings in the bankruptcy court with the intent to obstruct and delay the completion of the bankruptcy proceedings.

26. Furthermore, the conduct of Defendants, as alleged, in depriving Plaintiff of his fundamental liberty interests without due process was used by said defendants to leverage Plaintiff into a position of settlement by threatening Plaintiff with ultimate destruction of family integrity and Plaintiff's rela-

tionship with his children. All such conduct was done under color of state law, and said defendants were acting in concert with each other to deprive Plaintiff of his fundamental liberty interests and due process of law.

27. These events precipitated the original federal complaint against Defendants Huckabee, et al. on June 28, 1985, after bankruptcy court, leave was obtained over objections filed by Defendant Nancy Linkous, to allow Plaintiff to pursue his constitutional rights of access to and possession of his children.

28. Because of the continual obstruction and delay by Defendants of the chapter 11 proceedings and the improbability of its approval, conversion to chapter 7 was effected on July 12, 1985.

29. October 7, 1985, leave of bankruptcy court to hear the entire divorce was granted by Judge Wheless and divorce matters were heard by Judge Casseb for the second time on October 16, 1985. In this hearing Plaintiff was ordered to take a lien out on his automobile to pay child support, even though the bankruptcy trustee, through his attorney, had not exempted the automobile and stated that the automobile was the trustee's property. Attempts by Plaintiff to obtain a loan on the automobile were unsuccessful at several banks because of the issue of questionable ownership or title of the automobile. Any transaction of this nature would be construed to be a violation of the Federal Bankruptcy Court as a prohibitory transaction.

30. On October 23, 1985, this Court conducted a pretrial conference concerning this case wherein neither Defendant Fogo nor his counsel were present and Defendant Fullenweider was not present, although represented by counsel. Defendant Nancy Linkous was represented by the firm of Haynes and Fullenweider.

31. On November 12, 1985, another State visiting judge, Honorable Peter Curry, was appointed to hear the state divorce case with leave of bankruptcy court being granted on November 12, 1985. On the 1st day of this trial, prior to jury selection, Defendant Fullenweider ex-parted Judge Curry concerning Plaintiff and the case for self-serving purposes and to prejudice the court against Plaintiff. Judge Curry made a three day attempt to settle this case by conferences with the parties outside the presence

of their attorneys and agreement was reached on all issues except for payment of Defendant Fullenweider's attorney fees. Defendant Fullenweider refused to sever his fees as an issue from the case, thereby thwarting resolution of the divorce, custody and property. This forced the entire case to resolved by trial by jury of all issues.

32. During April 1986, Honorable Thomas Stovall, the presiding judge, appointed Honorable Thomas Kenyon to preside over the divorce/custody trial involving Plaintiff and Defendant Nancy L. Linkous. the case was placed on the jury docket to begin on May 5, 1986. Prior to jury selection, Plaintiff's trial counsel advised the Court that he had suffered an injury to his neck and shoulder approximately 10 days before the beginning of trial, and advised the Court

and other counsel that such injury might present a problem, but that counsel was willing to proceed with trial. On May 6, 1986, a jury was selected, empaneled, and sworn to hear this case. The jury was advised by Judge Kenyon that this case would require two weeks to complete. Beginning on May 6, 1986, Defendant Nancy L. Linkous, through Defendant Fullenweider, began presenting her case in chief to the jury. Defendants Nancy L. Linkous and Fullenweider presented testimony to the jury on May 7, 8, and 9, 1986. On the afternoon of May 9, 1986, counsel for Plaintiff, suffering from the preexisting injury, became physically debilitated to continue with trial before the jury, and the case was recessed for the weekend of May 10 and 11, 1986. On May 12, 1986, counsel for Plaintiff was still debilitated but appeared for con-

tinuation of the trial on May 13, 14, 15, 16 and 19. On May 20, 1986, the preexisting injury of Plaintiff's counsel exacerbated once again and Plaintiff's counsel was required to seek medical attention from Jose Tandoc, a specialist in EMG studies. On that same day, Plaintiff's counsel and Plaintiff appeared in the 247th District Court before Judge Kenyon and advised the Court that Doctor Tandoc had diagnosed Plaintiff's counsel as having a severe C-7 radiculopathy. The trial judge then recessed the case until May 27, 1986, so that Plaintiff's counsel could seek medical attention and advice and physical therapy, and so that the trial judge could attend a holiday family reunion. Plaintiff's counsel consulted with Dr. Andrew Kant, an orthopedic specialist, who confirmed Dr. Tandoc's diagnosis and

recommended cervical surgery if physical therapy did not remedy the situation. Plaintiff's counsel advised the Court of this fact and further sought an additional opinion from as specialist in neurology, Dr. Sung Rho at the Northeast Medical Center Hospital, who once again confirmed the previous diagnosis. Finally, on May 27, 1986, Plaintiff's, counsel under the relevant Disciplinary Rules of the State Bar of Texas (DR 5-110), moved the Court to continue the case for a period of two weeks so as to allow Plaintiff's counsel to rehabilitate himself without the necessity of surgery. The trial court denied such continuance, whereupon, Plaintiff's counsel moved for a mistrial which was also denied. Left with no other choice, Plaintiff's counsel moved to withdraw from further representation of Plaintiff in the case because his

physical and mental condition rendered it unreasonably difficult to carry out his employment with Plaintiff. Plaintiff and his counsel made every reasonable and diligent effort to secure other counsel to continue the case before the jury. Plaintiff will show on hearing that he and his counsel contacted over 20 attorneys, and obtained two affidavits from family law specialists in Harris County, Texas, which confirmed the impossibility of obtaining an attorney at such a late date without a substantial retainer and at least 30 days preparation. In light of the fact that approximately nine days of trial testimony before a jury had taken place, all counsel contacted indicated that they would need at least 30 days to familiarize themselves with the case along with a very extensive retainer, which Plaintiff did not have. On

Wednesday, May 28, 1986, Plaintiff was compelled to proceed to trial before a jury in a pro se capacity to begin with evidence in his case in chief.

33. On May 28, 1986, Plaintiff apprised the court of Jury misconduct by virtue of an imposter juror which was documented by juror qualification and juror information records. Defendant Kenyon refused to examine this juror or to discharge the jury even after urging by Plaintiff.

34. On this date Plaintiff called his first witness, Defendant Huckabee, who had been properly subpoenaed to the court. Defendant Huckabee failed and refused to appear. Plaintiff's Application for Writ of Attachment was heard by Defendant Kenyon and denied. This denied Plaintiff a crucial witness to refute the allegations of Defendants Nancy Linkous

and Fullenweider during her case in chief.

34. Defendant Huckabee, when served with a subpoena to appear as a witness on behalf of Plaintiff, threatened the security and well-being of the individuals who were attempting to deliver the subpoena.

36. Plaintiff, a medical doctor, objected strenuously to proceeding pro se, but because of fear of default, attempted to present his case through June 5, 1986. Plaintiff repeatedly informed the Court of his inexperience and inepti-tutde in law and trial procedure, and continually moved for continuances and/or mistrials so as to prevent prejudice to his case. All such motions and efforts on the part of Plaintiff were rebuffed by the trial court, and Plaintiff continued

to attempt to present his case through June 5, 1986.

37. Throughout Plaintiff's efforts to present his case, pro se, Plaintiff repeatedly entreated with the Court to allow a continuance to obtain counsel or to allow his former counsel to rehabilitate 'to the extent that he could reappear and assist Plaintiff in completing the trial. Such requests were repeatedly denied by the trial judge. In fact, Plaintiff petitioned the Court of Appeals of Texas for the 14th Supreme Judicial District and the Texas Supreme Court for a stay of the trial proceedings so as to allow Plaintiff to obtain counsel to assist him in presenting his case and allowing the case to go to verdict. These Petitions were denied.

38. On May 21, 1986, Defendants Nancy Linkous, Fullenweider, and Fogo,

without pleadings and on oral motion, moved the Court to impress a trust on the Breezy Pines property, purportedly for the benefit of Defendant Nancy Linkous and the children. Each said Defendant knew, or should have known, by reason of their participation in the bankruptcy proceedings, and by reason of previous default on the issue of title and ownership of the Breezy Pines property in the name of the trustee in Bankruptcy, that their efforts were designed to circumvent the authority and jurisdiction of the United States Bankruptcy Court.

39. An emergency was alleged by Defendant Nancy Linkous and her counsel, Defendant Fullenweider, that Defendant Linkous was to be evicted on June 1, 1986, from her then residence of the previous 18 months. This was the stated emergency for the appointment of trustee

Fogo which was orally pronounced on May 21, 1986, in court by Defendants Nancy Linkous, Fullenweider, and Fogo. No corroborating evidence of the eviction could be tendered by Defendants Nancy Linkous, Fullenweider, and Fogo. This was followed by the May 27, 1986, motion by Defendants Nancy Linkous, Fullenweider, and Fogo to vacate Plaintiff from the Breezy Pines residence with only his personal possessions to make way for occupancy by Defendant Nancy Linkous for her use during the pendency of this case.

40. On May 27, 1986, Defendant Kenyon, without prior notice to and/or approval of Plaintiff or his then-counsel, signed and entered an order naming Defendant Fogo as trustee of the 3102 Breezy Pines property, for the benefit of Defendant Nancy Linkous (and the

Linkous children) during the pendency of the divorce suit.

41. On June 3 and 4, 1986, during one-half day testimony each day, the issue was whether an emergency existed which would entitle the state court under § 11.11 to vacate Plaintiff from the Breezy Pines residence and allow occupancy by Defendant Nancy Linkous. Defendants Nancy Linkous, Fullenweider, and Fogo, with the assistance of Defendant Henderson, were allowed to put on their complete case. Plaintiff called Charles Long, the bankruptcy trustee's attorney, who refuted Defendant Henderson's testimony as to the position of the bankruptcy court in this regard, and confirmed that the appointment of trustee Fogo and occupancy by Defendant Nancy Linkous should not take place without bankruptcy court approval. Mr. Long stated that appropri-

ate actions would be taken in Federal Bankruptcy Court if the state court proceeded with this course of action. Plaintiff was denied the right to put on other witnesses who were present and desired to testify in opposition to the application of Defendants Nancy Linkous, Fullenweider, and Fogo. These included the Pension Plan beneficiaries who have a vested interest in the Breezy Pines property, an asset of the pension plan, and also several estate creditors who would be directly impacted upon by the state court's action. Breezy Pines residents, Gale Elliott and her 5 year old son, Eric Elliott were also present to testify against the application. Defendant Kenyon adamantly refused to allow Plaintiff time to present other witnesses or evidence in this matter.

42. No timely, proper notice was made by the Defendants or the state court to the Federal Bankruptcy Court, Bankruptcy Trustee or his attorney, Beneficiaries of the Pension Plan, Qualified estate creditors, or all Breezy Pines residents.

43. On or about June 4, 1986, the trustee in bankruptcy, through his counsel, submitted an emergency motion for temporary restraining order and/or preliminary injunction seeking to restrain the action contemplated by the order entered by Judge Kenyon. A true copy of such emergency motion is attached hereto and incorporated herein by this reference. [EXHIBIT B]

44. On June 6, 1986, upon application of Defendant Nancy Linkous, Defendant Don Fogo, and Defendant Donn Fullenweider, without notice to or the

presence of Plaintiff, Defendant Kenyon signed a order which ordered that possession of the Breezy Pines residence, then considered to be part of the bankruptcy estate involving Plaintiff, be delivered to Defendant Nancy Linkous on June 7, 1986, and Plaintiff was enjoined and restrained from interfering with the turnover of possession. A true and correct copy of said order is attached hereto and incorporated herein by this reference. [EXHIBIT C]

45. On June 7, 1986, Plaintiff was forced to vacate the property described in the referenced order on 24 hours notice of final order signed by Defendant Kenyon, which was never properly served on Plaintiff.

46. On Friday, June 13, 1986, Richard Johnston, C.P.A., on behalf of the Federal Bankruptcy trustee's attor-

ney, attempted to obtain the statement of facts of the State Court hearings with respect to the Breezy Pines residence takeover. Johnston was obstructed in his endeavors by the threat of Defendants Kenyon, and Fullenweider, and Fogo to impound any funds paid to any court reporter on behalf of Plaintiff or for his benefit or the benefit of the Federal Bankruptcy Court and bankruptcy creditors.

47. Without notice or hearing and by ex parte means, on June 6, 1986, Defendants Kenyon, Fullenweider, Fogo, and Nancy Linkous denied access to and possession of Plaintiff's children to Plaintiff for his regular period of possession, the weekend of June 6, 1986, to June 8, 1986, as set out in current temporary orders. Defendant Kenyon, without notice to Plaintiff or hearing, ordered

Defendant Fullenweider, on Defendant Fullenweider's urging, to prepare a "gag order" for possible use in this case. Other matters were discussed, ex parte, by these Defendants without notice to Plaintiff or his presence.

48. Through the week of June 9, 1986, Plaintiff continued to attempt to present his case, pro se, but Plaintiff was advised by Defendant Kenyon that Plaintiff's case would terminate on or about June 12, 1986, even though Plaintiff had not presented witnesses crucial to his case.

49. Plaintiff continued to implore Defendant Kenyon for counsel and continuance as he had no legal training and was inexperienced and inept and unwillingly pro se.

50. On June 12, 1986, Defendant Kenyon entered an order prohibiting

Plaintiff from presenting any further evidence in his behalf in connection with child custody and property matters involved in the state court divorce proceeding.

51. On June 16, 1986, Defendant Kenyon accepted all of Defendant Fullenweider's special jury issues and refused to submit any of Plaintiff's special issues as to form or substance. After an opportunity for Plaintiff to review the special issues, objections and/or corrections were to be made on June 17, 1986. Requests by Plaintiff, to Defendant Kenyon, about requirements to perfect Bills of Exception, were made by Plaintiff in order to preserve the record. Defendants Kenyon and Fullenweider stated that they were uncertain as to the proper way to handle the Bills of Exception in this case. Plaintiff proffered

the subjects of some of his Bills of Exception to the court reporter and requested that his previously submitted list of witnesses and relevant documents be included in the Bills of Exception.

52. On June 17, 1986, Plaintiff notified the clerk of the 247th District Court at 8:15 o'clock a.m., by telephone; and confirmed by telegram and mailgram; that Plaintiff was acutely ill and requested a continuance until Plaintiff recovered from his acute illness and was able to attend trial and proceed.

53. Then, in the absence of Plaintiff, on June 17, 1986, Defendant Kenyon deprived Plaintiff of his rights

* to call his other witnesses and give his own testimony;
* to hear and cross-examine the testimony of Defendant Fogo;

* to proffer his own special issues and present objections to the special issues of Defendants Nancy Linkous, Fullenweider and Fogo;
* to examine and object to the Charge of the Court; and
* to present his closing argument to the jury.

54. Additionally, in the absence of Plaintiff, on June 17, 1986, Defendant Kenyon charged the jury and submitted the case to the jury on special issues, after Defendant Fogo was allowed to present his case for attorney's fees and Defendant Fullenweider was allowed to present full closing arguments to the jury.

55. On the same day, June 17, 1986, the jury rendered its verdict which awarded custody of Plaintiff's two minor children to Defendant Nancy Linkous;

recommended child support in the amount of $17,500.00 per month against Plaintiff; awarded $239,000.00 to Defendant Fullenweider in attorney's fees, with contingent attorney's fees for the various appellate steps to be taken; found against Plaintiff for approximately $3,000,000 for an alleged fraud on the marital estate; awarded Defendant Nancy Linkous $500,000 in exemplary damages against Plaintiff; awarded Defendant Nancy Linkous $25,200 in back child support; awarded Nancy Linkous $500,000 for an alleged assault, including exemplary damages; awarded Defendant Nancy Linkous eighty five percent (85%) division of the community estate by Defendant Nancy Linkous and Plaintiff; and awarded Defendant Fogo the sum of $100,000 in attorneys fees, along with attorneys fees in

the event various appellate steps were taken.

56. Plaintiff was not notified of any of these decisions until later in the evening of June 17, 1986, when by-stander witnesses told Plaintiff that the proceedings had progressed to completion and verdict was rendered without his presence.

57. Plaintiff was denied hearing on pending motions submitted by Plaintiff in the course of the trial by Defendant Kenyon.

58. On Monday, June 23, 1986, Plaintiff learned that Defendant Kenyon signed a final judgment in this case on June 20, 1986, after said judgment had been prepared and approved by Defendants Fullenweider and Fogo, but without notice to or approval of Plaintiff. A true and correct copy of said final judgment is

attached hereto and incorporated herein by this reference. [EXHIBIT D] The attached motion for new trial is incorporated herein. [EXHIBIT F]

59. Defendant Nancy Linkous, in concert with and with the approval of Defendants Kenyon, Fullenweider, and Fogo, again excluded Plaintiff _____ to and possession of his children for the period of June 20 thr _____ further intentional and malicious deprivation of Plaintiff's f_____ to family integrity and a meaningful relationship with his children Plaintiff has no State remedy.

III.

CAUSES OF ACTION

FOR THE FIRST CAUSE OF ACTION

Plaintiff complains of the actions of Defendants Huckabee, Lesher, Kenyon, in their sua sponte deprivation of

Plaintiff's fundamental interests with respect to his possession of and access to his family as herein alleged, and Plaintiff requests the Court to declare said actions unlawful, and award him damages, costs and attorney's fees.

FOR A SECOND CAUSE OF ACTION

Plaintiff seeks damages from Defendants Fullenweider and Nancy Linkous for malicious prosecution, under the pendent claim doctrine.

FOR A THIRD CAUSE OF ACTION

Plaintiff seeks damages, costs, and attorney's fees against Fullenweider, Nancy L. Linkous, Fogo, and Flake for deprivations of Plaintiff's fundamental liberty interests, which are alleged hereinabove.

FOR A FOURTH CAUSE OF ACTION

Plaintiff seeks a temporary injunction against Defendants Fullenweider,

Linkous, Fogo, and Flake, prohibiting them from engaging in further civil rights deprivations against Plaintiff's fundamental liberty interests.

FOR A FIFTH CAUSE OF ACTION

Plaintiff requests that the Court make such temporary injunction permanent upon final hearing hereof.

FOR A SIXTH CAUSE OF ACTION

Plaintiff requests that the Court declare § 11.11, Texas Family Code, unconstitutional on its face and as construed and applied, because it allows state interference with a fundamental liberty interest during the course of an on-going controversy that alters the status quo of the family integrity and the parent-child relationship without due process of law and it does not allow any procedure or means by which such decisions can be reviewed to determine their

validity. Further, § 11.11 operates to deprive Plaintiff and those similarly situated of equal protection of law, as construed and applied.

FOR A SEVENTH CAUSE OF ACTION

Plaintiff alleges that Defendants 247th Judicial District Court of Harris County, Texas, Donn C. Fullenweider, Don Fogo, Nancy Linkous, Honorable Thomas Kenyon, and Thomas Henderson, acting individually and in concert with each other, have engaged in a pattern of racketeering activity, as defined in 18 U.S.C. § 1961; that the 247th Judicial District Court of Harris County, Texas constituted an enterprise, which was engaged in and affecting commerce; that each Defendant, acting under the auspices of the referenced enterprise, and within the pattern of racketeering activity, caused injury to Plaintiff in his busi-

ness and property, by reason of the foregoing conduct.

Plaintiff further alleges and charges, as part of the pattern of racketeering activity, as follows:

1. That beginning on or about, and after, May 21, 1986, during the pendency of Plaintiff's divorce action, Defendants Nancy Linkous, Fullenweider, Fogo, and Henderson made material representations to Defendant Kenyon, who was then acting as the presiding judge to the 247th Judicial District Court of Harris County, Texas, with respect to certain property that was then believed to be property of Plaintiff's bankruptcy estate;

2. The representations made by said Defendants included that Defendant Nancy Linkous would be evicted from her residence on June 1, 1986, and that the

children of the marriage of Plaintiff and Defendant Nancy Linkous would be thrown into the streets;

3. Said Defendants represented to Defendant Kenyon, acting judge of the 247th Judicial District Court of Harris County, Texas, that an emergency existed which would support and justify their representations;

4. No emergency existed;

5. The representations made by said Defendants with respect to the alleged emergency situation, and the status of the property involved, were false when made, in that no emergency existed, and such representations were material with respect to existing facts;

6. The misrepresentations of fact by said Defendants were made willfully and wantonly, and with the intent of circumventing Title 11 U.S.C.

Section 362 (dealing with automatic stays in bankruptcy proceedings) and with intent to harm Plaintiff, and with further intent to induce Defendant Kenyon to act thereon;

7. As a result of the referenced misrepresentations and/or omissions, Defendant Kenyon entered orders on May 27, 1986, and June 6, 1986, which effectively circumvented Title 11, U.S.C. § 362 [copies of the referenced orders are attached hereto and incorporated herein as EXHIBITS C and E];

8. As a result of each of the aforementioned Defendants' actions, Plaintiff, his creditors, and beneficiaries of the pension plan which Plaintiff represents, have suffered damage, harm, and injury, all in violation of 18 U.S.C. Section 1962 (c), Section 1964 (c);

9. Plaintiff alleges and charges that the foregoing conduct on the part of each of said Defendant constitutes a predicate act of "Racketeering activity", as defined in under 18 U.S.C. Section 1961;

10. On or about June 7, 1986, Plaintiff vacated the Breezy Pines premises, pursuant to Defendant Kenyon's order;

11. On or about June 13, 1986, and within ten years of the preceeding act of Racketeering activity, Plaintiff will show that Richard Johnston, C.P.A., approached the Court Reporter of the 247th Judicial District Court of Harris County, Texas, to request and obtain a statement of facts relating to the Racketeering activity described above. In furtherance of and associated with the enterprise, Defendants Fullenweider,

Nancy L. Linkous, Fogo, and Kenyon did, in violation of 18 U.S.C. Section 1503, by communications and influences, obstruct, impede, and endeavor to influence, obstruct and impede the due administration of justice of the United States Bankruptcy Court for the Southern District of Texas, sitting in Houston, Texas, by the following acts:

a. threatening Richard Johnston;

b. impeding the acquisition of facts which would reflect a fraudulent interference with the jurisdiction and power of the United States Bankruptcy Court for the Southern District Texas in violation of 11 U.S.C. Section 326; and

c. all of which constitutes the second predicate act of Racketeering activity, within the meaning and definition of 18 U.S.C. Section 1961.

12. As alleged in paragraph number twenty-one, of the factual statement herein, Defendant Flake in concert and combination with Defendants Nancy L. Linkous and Fullenweider, monitored telephone conversations between Plaintiff and his children without permission from either party, all in furtherance of the scheme to deprive Plaintiff of his constitutional rights enumerated herein. Such conduct was in violation of 18 U.S.C. Section 1343 (Wire fraud) and, as such, constitutes a predicate act of Racketeering activity, within the meaning and definition of 18 U.S.C. Section 1961.

13. Plaintiff will further show, that at all times material hereto, Defendants engaged in the activities described herein by use of the interstate communication of the telephone system in furtherance of the scheme particularly de-

scribed herein, in violation of 18 U.S.C. Section 1343, which constitutes an additional predicate act of Racketeering activity, within the meaning and definition of 18 U.S.C. section 1961.

14. Throughout the entire course of the proceedings which are described in this amended complaint, the Defendants, and each of them, made use of the mails in violation of 18 U.S.C. Section 1341, in furtherance of the scheme described herein. More particularly, on or about June 20, 1986, the Defendants, in concert with each other, caused to be mailed to Plaintiff the Decree of Divorce which includes, among other things, the cloud on the title to the Breezy Pines property. Such act in particular constitutes an additional predicate act of Racketeering activity within the meaning and definition of 18 U.S.C. Section 1961.

15. Said defendants conducted and participated, directly and indirectly, in the conduct of the "enterprise's" affairs, through a pattern of Racketeering activity, which consisted of at least two Racketeering activities, all of which is a violation of 18 U.S.C. § 1962(c).

16. Plaintiff further alleges that the enterprise consists of the 247th Judicial District Court of Harris County, Texas; and that through said enterprise, an alternative enterprise existed consisting of the referenced individual Defendants associating with each other in fact;

17. With the exception of the 247th Judicial District Court of Harris County, Texas, each of the named Defendants in this cause of action were "persons" operating and conducting the enterprise;

18. That by the pattern of activity described herein, including the purpose of said acts, the timing involved, the methods employed, and the intent to harm and damage Plaintiff, the activities of the "enterprise" affected interstate commerce, to the detriment and injury of Plaintiff, Plaintiff's bankruptcy estate, his creditors and the beneficiaries under the Defined Benefit Plan and the Money Purchase Trust Plan;

19. Plaintiff further alleges that Defendants Nancy Linkous, Fullenweider, Fogo and Henderson, beginning on or about May 21, 1986, and through June 17, 1986, did agree with each other to commit the foregoing acts described as "Racketeering activity," in violation of 18 U.S.C. § 1962(d).

20. Plaintiff further alleges and will show that on June 20, 1986, Defen-

dant Kenyon, acting presiding judge of the 247th Judicial District Court of Harris County, Texas, signed a judgment [a copy of which is attached hereto], at the request and instance of Defendants Fullenweider and Fogo, which set aside the Breezy Pines property as Defendant Nancy Linkous' sole and separate property, and attempted to divest Plaintiff, his creditors, the bankruptcy estate, and the beneficiaries of his pension plan or any right, title, interest, and claim in and to such property. Reference is made to pages 13 and 14 of the "Decree of Divorce." Plaintiff alleges that the signing of said judgment creates a cloud on the title to the Breezy Pines property, and such action is an additional act of Racketeering activity within the preview of 18 U.S.C. § 1961.

FOR AN EIGHTH CAUSE OF ACTION

Plaintiff contends and alleges that because of the foregoing facts recited above, the state trial was so fundamentally unfair that the judgment rendered thereon violates the due process clause of the 14th Amendment to the United States Constitution.

FOR A NINTH CAUSE OF ACTION

By its very terms, the Decree of Divorce has impressed a judgment lien against all of Plaintiff's assets, including many assets that are being held by the trustee in Plaintiff's bankruptcy action. Furthermore, the Decree of divorce allows execution on the various judgments that were rendered therein. Moreover, as hereinabove alleged, Defendants Fullenweider, Fogo, and Kenyon have threatened that if Plaintiff seeks to obtain any statement of facts for purpos-

es of appeal or otherwise, any funds paid to any court reporters would be impounded by the 247th Judicial District Court of Harris County, Texas, to satisfy child support obligations. Under Texas law, only a supersedeas bond and other security given by Plaintiff would prevent execution of the Decree of Divorce or impounding funds for the purpose of obtaining a statement of facts on appeal. Thus, the application of the supersedeas bond and lien provisions of Texas law effectively precludes Plaintiff from exercising his right to appeal in the Texas courts, and, necessarily, to petition for certiorari to the United States Supreme Court, all in violation of the Due Process and Equal Protection Clauses of the 14th Amendment to the United States Constitution. As hereinafter alleged, Plaintiff seeks a temporary

restraining order and preliminary injunction to enjoin and restrain the Defendants from taking any action to enforce or attempt to enforce the Decree of Divorce entered by the 247th Judicial District Court of Harris County, Texas.

IV.

ANTI-INJUNCTION STATUTE AND ABSTENTION

This suit seeks to redress deprivation under color of state law rights secured to Plaintiff by the Constitution and the Laws of the United States of America. The anti-injunction statute, 28 U.S.C. § 2283, which provides that a federal court may not enjoin a state proceeding "except as expressly authorized by an act of Congress" is inapplicable by reason of the expressed provisions of 42 U.S.C. § 1983, et. seq.; and 18 U.S.C. § 1961, et. seq.

Plaintiff further alleges, and will show upon hearing, that abstention is inappropriate in this case for the following reasons:

1. The underlying state court proceeding has proceeded to verdict;

2. Plaintiff has been forced to proceed pro se by reason of medical disability of his long-standing counsel;

3. that the actions in the state court have been pursued in bad faith, motivated by a desire to harass Plaintiff and in retaliation of the filing of this suit to redress deprivation of rights secured to Plaintiff by the First, Fifth, and fourteenth Amendments to the United States Constitution; and that Plaintiff, by reason of the conduct on the part of the Defendants alleged hereinabove, has been deprived and will be deprived of an opportunity to present his federal con-

stitutional claims in the state court proceedings; and

4. by reason of the action of the named Defendants herein, Plaintiff is clearly barred, absent a statement of facts, from interposing his constitutional claims in the state court proceedings. Plaintiff alleges that the conduct of the state judiciary, in light of the foregoing allegations, was such that it in fact denied him an opportunity to be heard on matters of state and/or federal matters that were within the preview of corrective state action, in light of principles of constitutional law. Plaintiff has been denied an opportunity to press his constitutional claims in the state courts.

V.

LACK OF IMMUNITY OF DEFENDANTS HUCKABEE, LESHER, AND KENYON

As alleged above, defendants Huckabee, Lesher, and Kenyon did not have subject matter jurisdiction to deprive Plaintiff of his fundamental liberty interest, and each Defendant judges' conduct was an action in the face of a clearly valid statute and case law which expressly deprived them of jurisdiction. Their protection of absolute judicial immunity was therefore lost by each of them.

VI.

LACK OF IMMUNITY OF DEFENDANT FOGO

Defendant Fogo would be entitled at best to assert a qualified immunity. Any immunity is lost if he acts beyond the scope of his duties. See, Imbler v. Pachtman, 96 S. C. 984 (1976). Further-

more, any good faith immunity is an affirmative defense.

VII.

APPLICATION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Pending trial of the issues raised in the amended complaint, Plaintiff respectfully seeks an immediate temporary restraining order, and, after hearing, a preliminary injunction, prohibiting each of the said Defendants, their employees, agents, attorneys, and servants from taking any action of any kind whatsoever to enforce or attempt to enforce the Decree of Divorce entered on June 20, 1986, by Defendant Kenyon, as presiding judge of the 247th Judicial District Court of Harris County, Texas, a copy of which has been attached to this complaint, including, without limitation, attempting to obtain or file any judg-

ment, liens, or abstract of judgment related to the decree of Divorce, or initiating or commencing any steps to execute on said Decree of Divorce. Plaintiff shows by the foregoing facts, that unless a Temporary Restraining Order is issued, and thereafter made a Preliminary Injunction, Plaintiff will suffer irreparable injury to his bankruptcy estate, his creditors, beneficiaries of pension plans, and to his right to appeal the Decree of Divorce; the jurisdiction of the United states Bankruptcy Court for the Southern District of Texas will be subverted; Plaintiff's business and personal assets, from the very fact of the Decree of Divorce and its intent, are under immediate threat of liquidation, all of which shows irreparable harm and injury for which Plaintiff has no adequate remedy at law. Plaintiff further

contends that based on the facts alleged herein, and facts to be shown at hearing hereon, a direct appeal from the Decree of Divorce entered on January 20, 1986 is not frivolous, and Plaintiff has shown a substantial likelihood of success on any number of the non-federal points for appellant review in the courts of Texas or on a petition for certiorari to the Supreme Court of the United States. Furthermore, Plaintiff has demonstrated herein, and will show on hearing, that he has been heretofore denied the fundamental requisites of Due Process in that he has been denied an opportunity to be heard in the state trial court, and based upon the Decree of Divorce and the previous threats of impounding funds for court reporters notes and statement of facts, Plaintiff's avenues of appeal are effectively closed, or will be closed, impend-

ing Plaintiff's open and equal access to the courts. Plaintiff contends that the Texas supersedeas bond provisions, combined with the immediate enforcement of the Decree of Divorce and its tenor enforcement provisions, effectively bars Plaintiff's meritorious appeal. To take an appeal to a Texas court without a statement of facts or assets to pursue obtaining a statement of facts, would be meaningless. Moreover, Plaintiff, a practicing physician, would be effectively hamstrung in his profession and business if the enforcement provisions of Texas law and the Decree of Divorce are not restrained and enjoined. Moreover, the public interest would be furthered, or at least not appreciably damaged, by this court granting the Temporary Restraining Order and Preliminary Injunc-

tion with respect to the alleged subversion of the Bankruptcy Act.

Plaintiff further alleges that the orders of the 247th Judicial District Court which placed the Breezy Pines property in trust, relegated possession to Defendant Nancy Linkous, and ultimately, in the Decree of Divorce, set aside such asset as the sole and separate property of Defendant Nancy Linkous, threatens to nullify the authority and power of the United States Bankruptcy Act.

WHEREFORE, PLAINTIFF prays that his request for a Preliminary Injunction be set for hearing as soon as practically possible consistent with the court's docket; that a Temporary Restraining Order issue immediately upon order to show cause; that, upon hearing, a Preliminary Injunction be issued directed toward Defendants consistent with the alle-

gations contained in this complaint; and that upon final hearing, Plaintiff recover damages, costs, and attorneys fees, and such relief to which he shows himself justly entitled.

Respectfully submitted,

JAMES M. MURPHY
STATE BAR OF TEXAS #14700800

/s/
Renaissance Place - Suite 340
714 Jackson Street
Dallas, Texas 75202
(214) 745-1532 /
(214) 742-2370

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above and foregoing Second Amended Complaint, along with the Motion for Leave to file same, was served on all existing attorney's of record, as reflected in the attached service list,by depositing same in the United States

Mail, postage pre-paid, on this 25th day of July, 1986.

/s/ _____
JAMES M. MURPHY

SERVICE LIST

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NANCY L. LINKOUS
3102 BREEZY PINES COURT
KINGWOOD, TEXAS 77339

HAYNES & FULLENWEIDER
ATTN: CLINARD HANEY
4300 SCOTLAND STREET
HOUSTON, TEXAS 77007

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared Dan M. Linkous, known to me to be the person whose signature appears hereinafter, who, after being duly sown stated upon his oath as follows:

> "My name is Dan M. Linkous. I am the Plaintiff in the entitled and numbered cause. I have personal knowledge of the matters of fact and allegations contained in the foregoing Second Amended complaint, and such allegations are true and correct, according to my knowledge"

_____
DAN M. LINKOUS, AFFIANT

SUBSCRIBED AND SWORN TO before me on this, the _____ day of July, 1986.

_____
Notary Public in and for
The State of Texas